

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHUCK WILLIAM BACON,

Defendant-Appellant.

UNPUBLISHED

June 10, 2008

No. 274242

Wayne Circuit Court

LC No. 06-005895-01

Before: Talbot, P.J., and Zahra and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of second-degree murder, MCL 750.317, assault with intent to murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant, as a fourth-offense habitual offender, MCL 769.12, to 60 to 90 years' imprisonment for his second-degree murder conviction, 60 to 90 years' imprisonment for his assault with intent to murder conviction, three to five years' imprisonment for his felon in possession of a firearm conviction, and two years' imprisonment for his felony-firearm conviction. We affirm.

This case arose out of a neighborhood shooting. On the night of April 9, 2006, Cardaro Larkins, Darrius Spikes, and James Singleton were near Singleton's house on James Street "chilling and rapping." Larkins was leaving for the military the next day. Around 11:30 p.m., Chuck Bacon, Sr., defendant's father and an acquaintance of the Larkins family, drove up and invited Larkins, Spikes, and Singleton to a warehouse he owned, which was used as a recording studio and after-hours club. The boys accompanied defendant's father, who let them into the studio and drove off. By 12:20 or 12:30 a.m., on April 10, 2006, the boys realized defendant's father had left and decided to steal some recording equipment from the studio. After leaving with some items, Larkins and Spikes returned to the studio to lock the studio gate and close the front door. Singleton, however, returned home.

After Larkins and Spikes returned to the studio, a Ford Crown Victoria pulled up and defendant got out of the car to go inside the studio. Defendant claimed that he had just returned from performing a rap session at a club and had returned to the studio to clean up. Defendant noticed that the studio gate and doors were open when he arrived and that the studio had been ransacked. As soon as defendant went into the studio, Spikes and Larkins ran away in different directions. Spikes last saw Larkins running near Woodlawn Street. According to Spikes,

defendant followed Spikes in the Crown Victoria, got out of the car, and fired two shots at Spikes. Spikes claimed that he was unarmed during this incident and fired no shots. Spikes ran back to his neighborhood where he had agreed to meet Larkins, but Larkins did not arrive. Around 1:00 a.m., police found Larkins lying on his back in a field near Woodlawn Street. Larkins had been fatally shot in the forehead. The next morning, Spikes provided police with one of defendant's rap videos he had taken from the studio.

In contrast to this version of events, defendant claimed that after leaving the studio, he followed Larkins and the two got into a fistfight before Larkins ran away from him and toward a field. At this point, Spikes approached and fired four shots at defendant. Defendant retrieved a "thirty-eight," returned fire, and drove away. Defendant then picked up Lateece Turner and Indea Knox and brought them back to the studio for sex around 2:30 a.m. The women stayed with defendant at the studio until 10:00 or 11:00 a.m.

Turner later provided a statement to police in which she indicated that defendant informed her that before picking her up, he shot at someone who was stealing equipment from the studio. Although Turner affirmed this statement at an investigative subpoena hearing, she testified at trial that this version of events was not true. Instead, Turner claimed at trial that defendant had told her that he "tussled" with the person who broke into the studio and then returned fire after someone shot at him.

Knox also provided a statement at an investigative subpoena hearing. Knox indicated that defendant told her, "I had to do what I had to do," with regard to the break-in. In addition, Knox testified at the investigative subpoena hearing that she was fearful of "Chuck's family or his boys," that "everyone know[s] [defendant] did it[.]" and that "it was out that [Knox and Turner] were with [defendant] during the shooting." At trial, Knox denied making these statements and claimed that she only learned from other people in the neighborhood that someone involved in the studio break-in had been shot.

Larkins's mother, Yolanda Wilson, testified at trial that sometime after the shooting, defendant waved a gun at her and said, "[I] can't be touched." Wilson drove away, but defendant allegedly followed her in his car and tried to run her off the road.

Defendant argues that he was denied his right to due process of law because the statements of Turner and Knox that incriminated defendant were obtained as a result of police intimidation. Because defendant did not object to this issue below, this issue is unpreserved, and we review for plain error affecting substantial rights. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130, reh den 461 Mich 1205 (1999). To be entitled to relief, defendant must show the existence of a clear or obvious error that affected the outcome of the lower court proceedings. *Id.* In addition, to warrant reversal, the error must have resulted in the conviction of an innocent defendant or must have seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.* at 763-764.

A successful attempt by the prosecution to intimidate a witness violates a defendant's right to due process of law. See *People v Canter*, 197 Mich App 550, 569; 496 NW2d 336 (1992), and *People v Stacy*, 193 Mich App 19, 25; 484 NW2d 675 (1992). "Threats from law enforcement officers may be attributed to the prosecution." *Stacy*, *supra* at 25.

At trial, Turner and Knox claimed that they had previously provided statements to the police linking defendant to the murder because the police intimidated them. Specifically, Turner testified at trial that the police told her that her statement was not good enough and threatened to take away her children and send her to jail. Similarly, Knox testified that the police threatened that she would go to jail if she did not provide a statement incriminating defendant. However, although Turner testified at trial that her testimony at the investigative subpoena hearing was not true, she then contradicted herself and admitted at trial that she was truthful with the police even after they threatened to take away her children. Similarly, Knox admitted that she had testified under oath at the investigative subpoena hearing that her statement to the police was the truth. Given that both Turner and Knox provided evidence that their previous incriminating statements were truthful, we find no plain error requiring reversal with respect to this issue. *Carines, supra* at 763-764. The jury heard the testimony about the alleged intimidation and also heard the denials by the police; as the trier of fact, it could reach its own conclusions about the weight to be afforded to Turner's and Knox's various statements.

We note that in arguing that Knox's statement to police was obtained as the result of police intimidation, defendant points out that Lance Newman, the officer in charge of the case, treated Knox in a friendly manner, bought her food, and commented on her underwear after she provided her statement. In making these arguments, defendant appears to insinuate impropriety rather than intimidation. However, when these assertions are placed in their proper context, it is clear there was no impropriety. Despite the fact that Knox provided no explanation at trial for these assertions about Newman's behavior, Newman explained that he had purchased food for Knox and Turner because the women had no food, having slept in their vehicle the night before the investigative subpoena hearing, and claimed they were homeless. Also, regarding Knox's underwear, Newman noted that he had questioned whether Knox's risqué attire was appropriate for court. The record does not indicate how Newman was able to see Knox's underwear. In light of the existing record, defendant has failed to show impropriety, let alone intimidation.

Defendant next claims that the admission of evidence that Knox felt threatened by defendant's family and friends was improper because it was irrelevant and overly prejudicial. We disagree. Because defendant failed to object below, this Court reviews this unpreserved evidentiary issue for plain error. *Carines, supra* at 763; *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003).

A defendant's threat against a witness is generally admissible to show consciousness of guilt. *People v Scholl*, 453 Mich 730, 740; 556 NW2d 851 (1996). In addition, a prosecutor may elicit testimony from a witness regarding threats from a defendant's family or others to show how those threats affected the witness's testimony or to explain a witness's prior inconsistent statement. See, e.g., *People v Clark*, 124 Mich App 410, 412; 335 NW2d 53 (1983). Evidence regarding the credibility of witnesses is admissible. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995). "If a witness is offering relevant testimony, whether that witness is truthfully and accurately testifying is itself relevant because it affects the probability of the existence of a consequential fact." *Id.*

At trial, Knox initially admitted that she had told the police and testified at the investigative subpoena hearing that she was concerned for her safety. However, she later asserted that she did not remember making this claim in her statement to the police or at the investigative subpoena hearing and did not remember providing any explanation for this concern.

After further questioning on this point, Knox flatly denied making any statement regarding her concern for her safety. The prosecutor then read into the record the following from Knox's testimony given at the investigative subpoena hearing:

Q. Why are you worried about your safety?

A. If I talk like I'm doing now, it may get out and something will happen to me.

Q. From who [sic]?

A. [Defendant's] family or his boys.

Q. Did [defendant] say anything about if you tell something will happen to you [sic]?

A. No. But I know how things are on the street.

Given that Knox had recanted her testimony in which she admitted providing a statement to police implicating defendant in the homicide, the admission of this evidence was proper because the issue of Knox's concern for her safety helped to explain the reason for Knox's inconsistent statements and bore directly on her credibility as a witness. *Mills, supra* at 72; *Clark, supra* at 412. Therefore, the admission of this evidence was proper. It had sufficient probative value that was not substantially outweighed by the danger of unfair prejudice. See MRE 403.¹

Defendant next asserts that the admission of evidence regarding defendant's harassment of Wilson violated MRE 404(b). We disagree. Because defendant objected below on a different basis than that asserted on appeal, our review is for plain error affecting substantial rights.² *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993); *Carines, supra* at 763.

Generally, evidence is admissible if it is relevant and inadmissible if it is not. MRE 402; *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 562 (2002). Evidence is relevant if it has any tendency to make a fact of consequence more or less probable. MRE 401; *People v Small*, 467 Mich 259, 264; 650 NW2d 328 (2002). Regarding the admissibility of prior bad acts, MRE 404(b)(1) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may,

¹ Moreover, contrary to defendant's assertion, the prosecutor's closing argument regarding how Knox's concern for her safety affected her credibility was also proper. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004) ("a prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes.")

² Defendant based his objection below solely on relevancy, without citing MRE 404(b).

however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

For evidence of prior acts to be admissible under MRE 404(b), it must satisfy three requirements: (1) the evidence must be offered for a proper purpose, i.e., one other than to prove the defendant's character or propensity to commit the crime, (2) the evidence must be relevant to an issue or fact of consequence at trial, and (3) the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice, as delineated in MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

At trial, Wilson testified that sometime after the shooting, she saw defendant in her neighborhood waving a gun. Wilson got into her car to leave, and defendant followed her in his car and "ran [her] off the road." Defendant told Wilson while waving his gun, "[I] can't be touched."

Moreover, Knox indicated that defendant told her that "he had to do what he had to do" in response to someone breaking into his studio. Also, defendant admitted that he worked to present his image as one of a "gangsta" and drug dealer in his videos and that he considered Turner, someone from his neighborhood, to be a "groupie." From this, it may be inferred that it was of paramount importance to defendant to maintain a certain reputation in his neighborhood and that his motive in killing Larkins was to uphold that reputation.

The evidence at issue supported this theory of the case. In other words, defendant's actions toward Wilson showed defendant's concern for his reputation in the neighborhood – the upkeep of which was his motive in killing Larkins. Besides its relevance to show motive, the evidence also helped to rebut defendant's theory that he acted in self-defense. Moreover, the fact that this evidence may be damaging does not make it unfairly prejudicial. *Mills, supra* at 75-76. Indeed, the evidence at issue included no gruesome or excessively violent details. Thus, defendant has failed to demonstrate plain error.

Defendant also makes numerous claims of prosecutorial misconduct. Because defendant failed to object or objected on different grounds below, each issue is unpreserved. We review under the plain error doctrine. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). If a curative instruction could have alleviated any prejudicial effect, there is no error requiring reversal. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003). The test for prosecutorial misconduct is whether the defendant was denied a fair trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

First, defendant contends that the prosecutor improperly elicited testimony regarding defendant's exercise of his right to remain silent.³ We disagree. A prosecutor may not comment

³ This issue is unpreserved because defendant objected below on hearsay grounds. *Stimage, supra* at 30.

on a defendant's post-arrest exercise of his right to silence. *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003). However, "the prosecution is entitled to contest fairly evidence presented by a defendant." *People v Reid*, 233 Mich App 457, 477; 592 NW2d 767 (1999). Thus, although a prosecutor may not introduce evidence of a defendant's post-arrest silence as substantive evidence of guilt, a prosecutor may introduce such evidence to rebut a defendant's claim that he was precluded from telling his side of the story. See *People v Allen*, 201 Mich App 98, 103-104; 505 NW2d 869 (1993).

Here, although the prosecutor elicited testimony from a police officer that defendant's attorney indicated after defendant's arrest that defendant would not provide a statement, defendant had previously testified that after his arrest, no police officer asked him what transpired the night of the incident even though he was in jail for eight days and he had allegedly acted in self-defense. Defendant's testimony arguably created the impression that he was unable to tell his version of events to police after his arrest. As such, defendant has failed to establish that the admission of evidence concerning his post-arrest silence constituted plain error.

Second, defendant claims that the prosecutor's closing argument improperly appealed to the jury's sympathy. This claim fails. In evaluating issues of prosecutorial misconduct, this Court must examine the prosecutor's remarks in context. See *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Although, a prosecutor may argue the evidence as well as all reasonable inferences arising from it as they relate to the case, *id.* at 282, a prosecutor may not appeal to the jury to sympathize with the victim, *Watson*, *supra* at 591.

During closing arguments, the prosecutor noted that Larkins was supposed to join the Air Force the day after he was shot to serve his country and to fulfill a promise to his family and community. When this comment is placed in context, it is clear the prosecutor was not attempting to appeal to the jury's sympathy. Rather, the prosecutor was contrasting Larkins's life, which, as the prosecutor stated, "[is] as real as it gets," with defendant's portrayal of his own life in his music videos, which defendant claimed was about "keeping it real[.]" to show the irony of defendant's rendition of events. "The prosecutor's comment was isolated . . . [and] did not blatantly appeal to the jury's sympathy, and the comment was not so inflammatory as to prejudice defendant." *Id.* Regardless, any possible prejudice was cured by the trial court's instruction to the jury that it was not to be influenced by sympathy. *Id.* at 592. Thus, defendant is not entitled to relief under the plain error doctrine.

Third, defendant contends that the prosecutor shifted the burden of proof by insinuating during closing arguments that defendant's self-defense claim was not credible, given that no questions were asked at the preliminary examination pertaining to defendant's acting in self-defense.⁴ We agree that the argument was improper; however, defendant has failed to show how it affected his substantial rights.

⁴ This issue is unpreserved because defendant's objection was based on his prior objection, on hearsay grounds, to the testimony underlying this argument. *Stimage*, *supra* at 30.

Although a prosecutor may comment on the evidence presented at trial and argue inferences related to his theory of the case, the prosecutor may not undermine the presumption of innocence by suggesting that the defendant has an obligation to prove anything, because such argument tends to shift the burden of proof. See, e.g., *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995).

However, where a defendant testifies at trial or advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant. Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof. [*Id.*]

Here, defendant's theory of the case was that he acted in self-defense. Although the prosecutor properly argued in response that the testimony of Knox, Turner, and Spikes did not support defendant's claim of self-defense, it was improper for the prosecutor to argue that because no questions were asked at the preliminary examination regarding this issue, defendant's theory was not credible. In essence, this argument went beyond arguing inferences from the evidence and instead suggested that because defendant failed to present evidence supporting his self-defense theory at the preliminary examination, the jury should discount it.

Notwithstanding, we conclude that any prejudice resulting from these comments was cured by the trial court's instruction that it was the prosecutor's burden, rather than defendant's, to prove beyond a reasonable doubt that defendant did not act in self-defense. Moreover, the evidence did not even support a claim of self-defense. Deadly force may only be used in self-defense if such force is reasonably necessary. *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002). According to defendant's own version of events, defendant was able to return to his car to retrieve a weapon after someone shot at him. Defendant then returned fire and left the scene. In light of this, defendant had an available avenue of retreat before returning fire, and the use of deadly force was unnecessary. *Id.* Therefore, we are unable to conclude that the prosecutor's error affected defendant's substantial rights.

Fourth, defendant argues that the evidence did not support portions of the prosecutor's opening statement and closing arguments. First, defendant claims that the prosecutor's reference during her opening statement to Spikes receiving "external pressure" was improper because Spikes did not testify about receiving any threats. This claim fails. "The purpose of an opening statement is to tell the jury what the advocate proposes to show." *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976); see also MCR 6.414(C). A prosecutor's statement during opening arguments that something will be proved, but which is not later proved, is not a basis for reversal if the statement was made in good faith. *People v Joshua*, 32 Mich App 581, 586; 189 NW2d 105 (1971).

During opening arguments, the prosecutor indicated that some witnesses, including Spikes, might testify inconsistently with previous statements they had provided due to "external threats." In light of Knox's statements regarding her safety concerns, the prosecutor was on firm ground in making this claim with respect to Spikes, who was involved in the altercation and lived in the same neighborhood as defendant's father. Regardless, any prejudice was cured by

the trial court's instruction that the attorneys' statements and arguments were not evidence. Thus, defendant has failed to show plain error affecting his substantial rights.

Also, defendant contends that the prosecutor's comment during opening arguments that Larkins was shot with in the back of the head was misleading. Although this comment was incorrect, defendant has not put forth evidence that the comment was made in bad faith. Moreover, he has not shown that the jury was misled or that the statement was outcome-determinative, given that the medical examiner explained during direct examination by the prosecutor that the bullet entered Larkins's forehead. Thus, this claim fails.

Regarding closing arguments, defendant claims that the prosecutor intentionally mischaracterized defendant's testimony by telling the jury that defendant knocked Larkins down with his car. The prosecutor is free to argue "the evidence and all inferences relating to his theory of the case." *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004). Here, defendant only testified that he "almost" knocked Larkins down with his car. Thus, the evidence did not support the prosecutor's argument. Regardless, any prejudice was cured by the trial court's instruction that the attorneys' statements and arguments were not evidence. Further, whether defendant actually or almost knocked Larkins down with his car was in no way relevant to the outcome of this case. Thus, defendant has failed to show how this affected his substantial rights.

Fifth, defendant argues that the prosecutor disparaged defense counsel by calling him a "game spinner" of facts during closing argument. This claim fails. It is improper for a prosecutor to personally attack defense counsel or to suggest that defense counsel is intentionally trying to mislead the jury. *Watson, supra* at 592; *People v Kennebrew*, 220 Mich App 601, 607-608; 560 NW2d 354 (1996). However, the prosecutor may point out deficiencies in defense counsel's arguments in light of the evidence. See *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Thus, a comment that might otherwise be improper "may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *Kennebrew, supra* at 608. The prosecutor's comments must be viewed in context and in light of all facts of the case. *Bahoda, supra* at 267 n 7.

The prosecutor's comment did not denigrate defense counsel. Rather, in context, the prosecutor's reference to defense counsel as a "game spinner" was a play on words comparing defense counsel to defendant, who was a neighborhood rap artist, and part of the prosecutor's rebuttal that the evidence did not support defense counsel's argument that defendant acted in self-defense. Therefore, defendant has failed to show a plain error that affected his substantial rights.

Sixth, defendant contends that the prosecutor improperly argued that defendant's family or friends were intimidating witnesses and that defendant's waving a gun at Wilson after the killing was inconsistent with his claim of self-defense. However, as previously noted, evidence regarding intimidation of witnesses by defendant's family and friends and evidence that defendant waved a gun at Larkins's mother was properly admitted. The prosecutor is free to argue "the evidence and all inferences relating to his theory of the case." *Thomas, supra* at 456. Further, the prosecutor did not argue that these inferences substantively proved defendant's guilt or showed defendant's bad character. In light of this, defendant has failed to show plain error, much less that his substantial rights were affected.

Defendant next contends that the presentation of defendant's rap video to the jury was improper because it was unfairly prejudicial and not relevant to any material issue at trial. We disagree. A trial court's evidentiary ruling is reviewed for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). However, preliminary questions of law pertaining to this issue are reviewed de novo. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

For pictorial evidence to be admissible, the evidence must be relevant under MRE 401 and its probative value must not be substantially outweighed by danger of unfair prejudice under MRE 403. *Mills, supra* at 66. Evidence is relevant if it has any tendency to make the existence of a fact of consequence more or less probable. MRE 401; *People v Small*, 467 Mich 259, 264; 650 NW2d 328 (2002). Generally, relevant evidence is admissible. MRE 402; *Taylor, supra* at 521.

At trial, the jury was shown a rap video depicting defendant and also depicting a gun consistent with a nine-millimeter or .380 semiautomatic handgun. Contrary to defendant's claim, the rap video was relevant to a material issue at trial. Specifically, the bullet recovered from Larkins's head was fired from either a nine-millimeter or .380 semiautomatic handgun. Because defendant claimed that the gun he used the night of the shooting was a .38 revolver, an issue at trial was defendant's access to a either a nine-millimeter or .380 semiautomatic handgun.⁵ Indeed, such access would have made it more probable that defendant was not testifying truthfully and was in possession of a firearm capable of shooting the bullet retrieved from Larkins the night of the shooting. Thus, the rap video was relevant.

Further, the video's probative value was not substantially outweighed by the danger of unfair prejudice. Although defendant referred to himself as a "certified gangsta" and a drug dealer in the video, defendant, himself, waived counsel's objection against the jury hearing the rap lyrics in the video. Moreover, although defense counsel noted that the video showed defendant with automatic weapons and objectifying women, the video was admitted for a proper purpose and is "not rendered inadmissible merely because [it] bring[s] vividly to the jurors the details of a gruesome or shocking accident or crime, even though [it] may tend to arouse the passion or prejudice of the jurors." *Mills, supra* at 77 (internal citations and quotation marks omitted).

Also in regard to this video, defendant claims the prosecutor attempted to mislead the jury in asking Knox whether she had seen "uzis and nine-millimeters" in the video and in asking defendant's father whether guns were "very prevalent" in the video. However, the jury viewed the video, which depicted defendant with handguns and automatic weapons. Thus, these questions were consistent with the evidence and not misleading.

Defendant further claims that the prosecutor's argument that defendant's state of mind in shooting Larkins was to protect his reputation as a "big bad rapper" was an improper use of

⁵ Although defense counsel claimed in closing that defendant fired some shots in self-defense, he added, "we're still maintaining that the shot that hit Mr. Larkins was not from my client's gun."

character evidence. However, as noted above, the prosecutor's theory of the case was that defendant's motive in shooting Larkins was to uphold his reputation in the neighborhood. The comment that defendant was a "big bad rapper" was consistent with this theory and was not offered to show defendant's propensity to commit a crime. Indeed, a prosecutor is not required to use "the blandest possible terms" when stating inferences from the evidence. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). Thus, defendant's claim fails.

Defendant contends that the trial court failed to provide a limiting instruction regarding this video. Although defendant objected to the instructions below, he made no objection that the court had failed to provide a limiting instruction. Therefore, we review for plain error affecting substantial rights. *Carines, supra* at 763. At the outset, we note that defendant failed to raise this issue in his statement of questions presented. Thus, this issue is not properly before this Court. MCR 7.212(C)(5); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). Regardless, even assuming there was plain error, defendant has failed to show how this affected his substantial rights, given that the video's admission did not unfairly prejudice defendant, as noted above. In any event, defendant fails to explain what instruction the court should have provided. An appellant may not leave it up to this Court to make his arguments for him. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). Therefore, this claim fails.

Defendant next argues that he was denied the effective assistance of counsel. We disagree. Because this issue is unpreserved, this Court limits its review to mistakes apparent on the existing record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004); *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 95 (2002). "To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that a reasonable probability exists that, but for counsel's errors, the result of the proceedings would have been different." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). A defendant must also demonstrate that the proceedings were fundamentally unfair or unreliable. *People v Rogers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

First, defendant claims that he was denied the effective assistance of counsel because trial counsel failed to request a continuance, despite the fact that he was retained only a few days before trial. We disagree. A defendant must show good cause and diligence in requesting an adjournment. *People v Coy*, 258 Mich App 1, 18; 669 NW2d 831 (2003). However, even with good cause and diligence, reversal is only warranted if the denial of a continuance prejudiced a defendant. *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000). Other than asserting the close proximity in time between counsel's retention and trial, defendant makes no argument regarding good cause or diligence, let alone prejudice.

It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position Failure to brief a question on appeal is tantamount to abandoning it. [*Kevorkian, supra* at 389 (internal citations and quotation marks omitted).]

In any event, it was clear that defense counsel was well prepared to try this case, given his vigorous cross-examination of the prosecutor's witnesses, presentation of defendant's case, and arguments on behalf of defendant. Thus, the failure to request an adjournment did not

prejudice defendant, and any request would have been futile. “Defense counsel is not required to make a meritless motion or a futile objection.” *Goodin, supra* at 433. Defendant was not denied the effective assistance of counsel on this basis.

Second, defendant claims that he was denied the effective assistance of counsel when counsel opened the door to his impeachment. Specifically, after defendant’s rap video was shown to the jury, counsel asked defendant, “Are you a dope dealer, a drug dealer?”⁶ Defendant denied this and claimed his persona as such in the video was just an image. During cross-examination, the prosecutor raised the issue that defendant had previously been convicted in 2002 of attempted delivery of less than 50 grams of marijuana. Although defense counsel objected, claiming that his question had only applied to whether defendant was currently a drug dealer, the trial court overruled the objection because defense counsel’s question “wasn’t limited to now. It was open ended.”

To succeed in his claim, “defendant must overcome a strong presumption that counsel’s assistance constituted sound trial strategy.” *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Defendant has failed to meet this burden. It was defendant himself who, contrary to counsel’s advice, requested that the jury hear the audio portion of the video in which he described himself as a drug dealer. In light of the potential prejudice that could result, it was sound trial strategy for defense counsel to raise the issue that defendant was not a drug dealer currently and that the video was merely an image. Further, given the form of defense counsel’s question – “Are you a dope dealer, a drug dealer?” – it is clear counsel attempted to confine this issue to the time of trial. Indeed, counsel made this argument in his objection to evidence of defendant’s prior conviction. Although the trial court apparently disagreed, we cannot second-guess counsel’s strategy with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Moreover, evidence of defendant’s prior conviction was but one issue testing defendant’s credibility. Indeed, the testimony of Turner, Knox, and Wilson showed that defendant’s behavior after the shooting was inconsistent with defendant’s claim of self-defense. Thus, counsel’s performance in this matter was not outcome-determinative.⁷

Third, defendant claims that defense counsel’s failure to object to each instance of alleged prosecutorial misconduct denied him the effective assistance of counsel. However, defendant has cited, at most, only three instances where the prosecutor’s actions were improper (i.e., the prosecutor’s argument in closing regarding whether evidence of self-defense was presented at the preliminary examination, the prosecutor’s argument in closing that defendant had knocked down Larkins with his car, and, arguably, the prosecutor’s argument during opening statements that Larkins had been shot in the back of the head). As noted above, these instances of misconduct were not outcome-determinative. Further, given that defendant failed to show any

⁶ Defendant referred to himself in the video as a drug dealer and a “certified gangsta.”

⁷ We note that defendant also claims that evidence of his prior conviction was inadmissible under MRE 609. However, although MRE 609 generally prohibits impeachment by evidence of a prior conviction, this rule is inapplicable “where evidence of prior convictions is offered to rebut specific statements of the defendant who testifies at trial.” *People v Taylor*, 422 Mich 407, 414; 373 NW2d 579 (1985). Thus, this claim fails.

impropriety by the prosecutor with regard to his other assignments of error, any objection to these would have been futile, and, therefore, unnecessary. *Goodin, supra* at 433. Defendant has failed to show that he was denied the effective assistance of counsel on this basis.

Defendant also claims that his trial attorney rendered ineffective assistance in failing to object to the introduction of evidence regarding the intimidation of witnesses. However, as discussed above, that evidence was admissible, and any objection by counsel would have been futile.

Defendant next asserts that he is entitled to resentencing because the trial court erroneously based its scores for Offense Variable (OV) 1 (aggravated use of a weapon), MCL 777.31, and OV 5 (psychological injury to a member of the victim's family), MCL 777.35, on facts not submitted to a jury, contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). At the outset, we note that defendant does not allege that OV 1 and OV 5 were miscored. Rather, defendant only claims that these variables were scored in violation of *Blakely*. Because defendant failed to raise this issue at sentencing, in a motion for resentencing, or in a motion to remand in this Court, and his sentence falls within the appropriate guidelines range, he is precluded from raising this issue on appeal.⁸ MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004).

Regardless, Michigan's sentencing scheme is unaffected by *Blakely* because Michigan uses an indeterminate sentencing scheme in which the trial court sets the minimum sentence but can never exceed the statutory maximum sentence. *People v Claypool*, 470 Mich 715, 730 n 14, 741, 744 n 1; 684 NW2d 278 (2004); *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). Thus, "[a]s long as the defendant receives a sentence within that statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict." *Drohan, supra* at 164. Here, defendant's sentence of 60 to 90 years for his second-degree murder conviction was within the statutory maximum for this offense, which is life. MCL 750.317. Therefore, the court properly used judicially ascertained facts in scoring the guidelines.

Finally, defendant argues that the cumulative effect of the errors denied him a fair trial. We disagree. "This Court reviews a cumulative-error argument to determine if the combination of alleged errors denied the defendant a fair trial." *People v Hill*, 257 Mich App 126, 152; 667 NW2d 78 (2003).

In order for a claim of cumulative error to warrant reversal, the errors must be of consequence. *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001). In some cases, the accumulation of minor errors may amount to error requiring reversal, even if individual errors, alone, would not. *Hill, supra* at 152. Nevertheless, "[o]nly actual errors are aggregated to determine their cumulative effect." *People v Rice (On Remand)*, 235 Mich App 429, 448; 597 NW2d 843 (1999) (internal citation and quotation marks omitted). Here, the only errors

⁸ Defendant's minimum sentence of 60 years falls well within his guidelines range of 22 ½ to 75 years (270 to 900 months).

defendant has shown are the prosecutor's argument pertaining to the lack of evidence of self-defense at the preliminary examination, the prosecutor's argument during closing that defendant knocked Larkins down, and, arguably, the prosecutor's argument during opening statements that Larkins had been shot in the back of the head. However, no prejudice resulted, and reversal is, therefore, not warranted on this basis. *Ackerman, supra* at 454. In all other respects, defendant has failed to show any actual errors. Therefore, "a cumulative effect of errors is incapable of being found." *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ Michael J. Talbot

/s/ Brian K. Zahra

/s/ Patrick M. Meter